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Clark v. Southview Hospital: Ohio Follows the Nationwide Trend of Using Agency by Estoppel to Impose Strict Liability on Hospitals

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CLARK v. SOUTHVIEW HOSPITAL:¹ OHIO FOLLOWS THE
NATIONWIDE TREND OF USING AGENCY BY ESTOPPEL
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I. INTRODUCTION

When a hospital is found liable for medical negligence, not only does the hospital pay the damages, so too does the consumer. In an era where health care costs are a prominent issue of concern for society as a whole, public policy clearly favors any available means of containment of these costs.

The underlying rationale for holding hospitals liable for negligent acts of their employees is based on the "deep pocket" theory of vicarious liability.² This theory imposes liability on the party who is, theoretically, in the best position to pay.³ The Ohio Supreme Court manifested its belief in the deep pocket theory in *Clark v. Southview Hospital & Family Health Center*.⁴ In *Clark*, the Ohio Supreme

¹628 N.E.2d 46 (Ohio 1994).

²See Section II *infra* which discusses vicarious liability and explains the deep pocket theory.

³*Id.*

⁴628 N.E.2d 46 (Ohio 1994).

Court further expanded the means by which a hospital could be held vicariously liable in medical malpractice cases under the theory of agency by estoppel.

In essence, the *Clark* decision renders hospitals strictly liable for negligent acts of physicians providing medical care within a hospital. The only apparent exception under *Clark* is where a patient and her personal physician independently choose a hospital as a situs for medical treatment.⁵

The *Clark* decision will have significant ramifications for Ohio hospitals. It will undoubtedly affect insurance costs, contractual arrangements between hospitals and physicians, and ultimately, consumer costs. Clearly it is questionable whether this decision furthered public policy.

In *Clark*, the Ohio Supreme Court set forth a test a plaintiff must meet in order to hold a hospital vicariously liable under the doctrine of agency by estoppel.⁶ The court based its test on numerous such decisions from jurisdictions across the country.⁷ However, the legal soundness of *Clark* and the decisions on which it relied is questionable, as many of these jurisdictions misapplied the legal doctrines underlying agency by estoppel theory.

This article analyzes the legal doctrines on which agency by estoppel is based, how this theory of vicarious liability has evolved in Ohio, and how state courts across the country have applied and misapplied this theory.

II. THE COMPLEXITIES OF AGENCY BY ESTOPPEL AS A MEANS OF IMPOSING VICARIOUS LIABILITY

Traditionally, hospitals were immune from liability under the doctrine of charitable immunity.⁸ Once the doctrine of charitable immunity was abolished, hospitals were subject to financial responsibility for the tortious acts of servants and/or agents, under the doctrine of vicarious liability,⁹ also known as *respondent superior*,¹⁰ or "Let the master answer." The underlying rationale of vicarious liability aims to impose the financial cost of tortious conduct on the party who is in the best position to pay the cost.¹¹ This party is usually the principal, who has the ability to distribute the cost to the public or community

⁵*Id.* at 53.

⁶See discussion *infra* Section III.D.

⁷628 N.E.2d at 53.

⁸See discussion *infra* Section III.A.

⁹Vicarious liability has been defined as: "[B]y reason of some relation existing between A and B, the negligence of A is to be charged against B, although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 69, at 499 (5th ed. 1984).

¹⁰*Id.* See also BLACK'S LAW DICTIONARY 1084 (6th abr. ed. 1991).

¹¹KEETON ET AL., *supra* note 9, § 69, at 500.

at large through mechanisms such as price adjustments and liability insurance.¹²

Hospitals were historically held immune from liability for the tortious acts of staff physicians, as physicians working therein were considered independent contractors rather than employees. Generally, agency theory refuses to hold an employer liable for tortious acts of independent contractors because the employer has no control over their conduct.¹³ It logically follows that because a hospital, *per se*, cannot practice medicine, it cannot control the conduct of its physicians, rendering a hospital immune.¹⁴

Gradually, this exception gave way as well, as hospitals grew in size, began offering comprehensive care, and operating for profit. The doctrine of agency by estoppel, historically prevalent in the commercial arena, imposes liability upon a "master" for tortious acts of retained independent contractors where a third party relies on the appearance of an agency relationship between the master and the independent contractor.¹⁵

The terms "agency by estoppel,"¹⁶ "ostensible agency,"¹⁷ and "apparent authority"¹⁸ are often used interchangeably.¹⁹ The intermingling of these terms and, more importantly, their doctrines, has caused confusion, as courts applying one or more of them are unclear as to whether proof of reliance on the part of the plaintiff is required before a plaintiff may recover under this theory. This confusion has produced numerous decisions nationwide which

¹²*Id.* at §§ 69 & 71.

¹³*Id.* at § 71. See also John D. Hodson, Annotation, *Liability of Hospital or Sanitarium for Negligence of Physician or Surgeon*, 51 A.L.R.4th 266-70 (1987).

¹⁴See *Moon v. Mercy Hosp.*, 373 P.2d 944 (Colo. 1962). But see *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. Ct. App. 1957).

¹⁵Agency by estoppel is defined as:

One created by operation of law and established by proof of such acts of the principal as reasonably lead third person to the conclusion of its existence. Arises where principal, by negligence in failing to supervise agent's affairs, allows agent to exercise powers not granted to him, thus justifying others in believing agent possesses requisite authority.

BLACK'S LAW DICTIONARY 40 (6th abr. ed. 1991).

¹⁶*Id.*

¹⁷Defined as:

An implied or presumptive agency, which exists where one, either intentionally or from want of ordinary care, induces another to believe that a third person is his agent, though he never in fact employed him. It is, strictly speaking, no agency at all, but is in reality based entirely upon estoppel.

Id. at 760.

¹⁸Defined as: "[S]uch authority as the principal knowingly or negligently permits the agent to assume, or which he holds the agent out as possessing." *Id.* at 62.

¹⁹See Diane M. Janulis & Alan D. Hornstein, *Damned If You Do, Damned If You Don't: Hospitals' Liability for Physicians' Malpractice*, 64 NEB. L. REV. 689, 696 (1985).

promulgate rules and tests for applying agency by estoppel while failing to recognize or adhere to the legal principles upon which this doctrine is based.

When applying the doctrine of agency by estoppel, courts look to either, and sometimes both, § 429 of the *RESTATEMENT (SECOND) OF TORTS*,²⁰ or § 267 of the *RESTATEMENT (SECOND) OF AGENCY*,²¹ to determine what factors a plaintiff must prove to successfully recover. Unfortunately, many of these courts fail to recognize the critical distinction between these two sections.

In a medical malpractice setting, § 267 of the *RESTATEMENT (SECOND) OF AGENCY* (hereinafter referred to as "Agency § 267") requires a plaintiff to show: (1) a representation by the hospital that the allegedly negligent physician is his servant or agent; and (2) the plaintiff, or injured party, must justifiably rely upon the skill or care of the apparent agent to his detriment.²² Comment *a* to Agency § 267 specifically sets forth that an injured party's belief that an actor (physician) is the defendant's (hospital) servant is insufficient to impose liability.²³ Comment *a* further states, "There must be such reliance upon the manifestation as exposes the plaintiff to the negligent conduct."²⁴

Alternately, § 429 of the *RESTATEMENT (SECOND) OF TORTS* (hereinafter referred to as "Torts § 429") requires a showing that the plaintiff accepted the independent contractor's services under the reasonable belief that the care was being provided by the employer (hospital) or by servants (physicians) of the employer.²⁵ Comment *a* to Torts § 429 expands this section's provisions by stating that liability may also be found where a third party held the requisite

²⁰This Restatement section entitled, "Negligence in Doing Work Which is Accepted in Reliance on the Employer's Doing the Work Himself," states:

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

RESTATEMENT (SECOND) OF TORTS § 429 (1964).

²¹Agency § 267, entitled "Reliance upon Care or Skill of Apparent Servant or Other Agent", states:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

RESTATEMENT (SECOND) OF AGENCY § 267 (1958).

²²*Id.*

²³*Id.* at cmt. *a*.

²⁴*Id.*

²⁵See *supra* note 20.

reasonable belief and procured the services in question on behalf of the injured party.²⁶

The critical distinction between these two Restatement sections is that Agency § 267 requires establishment of an estoppel, while Torts § 429 does not and, instead, only requires a showing of an apparent agency. This difference may appear trivial to one making a cursory reading of these sections, but whether a court deems Agency § 267 or Torts § 429 applicable will have a marked effect on the outcome of a case, as under either section, one party will be faced with a nearly insurmountable standard to overcome.

Where Agency § 267 is applied, a plaintiff will bear the onus of demonstrating: (1) the hospital represented that the doctor was their employee; (2) she believed that the physician who treated her was an employee of the hospital at the time of treatment; and (3) she relied on this belief to her detriment.²⁷ Because an injured person, in an emergency situation, typically does not choose the situs for treatment, it is unlikely that a plaintiff will be able to meet this burden.²⁸

Alternately, when Torts § 429, or the apparent agency doctrine, is applied, a defendant-hospital will rarely be able to defend itself since a plaintiff will only have to demonstrate that she accepted the services of the independent contractor with the general belief that the physicians within the hospital were its employees.²⁹ Consequently, meeting the elements of Torts § 429 is significantly easier for a plaintiff as neither a representation by a hospital, nor reliance on that representation, need be shown. The significantly lower burden of proof under Torts § 429 will render a hospital, in essence, strictly liable.³⁰

²⁶*Id.* at cmt. a.

²⁷See *supra* note 21. See also *Jackson v. Power*, 743 P.2d 1376, 1381 (Alaska 1987); *Janulis & Hornstein*, *supra* note 19, at 696-97.

²⁸See *Torrence v. Kusminsky*, 408 S.E.2d 684, 692 (W. Va. App. Div. 1991), where the court held:

We find the application of ostensible agency particularly compelling when a patient seeks services from an emergency room. In such circumstances, there is often no time to arrange for the services of a private physician, and, in effect, the patient has no other choice but the emergency room. Frequently, the situation is tense, with the patient's family and friends in an emotional state.

See also, *Hannola v. Lakewood*, 426 N.E.2d 1187, 1190 (Ohio Ct. App. 1980).

²⁹See Claire Grandpré Combs, Comment, *Hospital Vicarious Liability for the Negligence of Independent Contractors and Staff Physicians: Criticisms of Ostensible Agency Doctrine in Ohio*, 56 U. CIN. L. REV. 711, 733 (1987).

³⁰The distinction between strict liability and vicarious liability is slight as in both circumstances a party is held liable even though free from any fault. See KEETON ET AL., *supra* note 9.

III. THE EVOLUTION OF AGENCY BY ESTOPPEL FOR OHIO HOSPITALS

The distinction between the two possible applications discussed above, as well as their contradictory effects, has not gone unnoticed by the judiciary. Ohio's decisions concerning agency by estoppel are a microcosm of the confusion state courts across the nation have experienced concerning this doctrine. This section will analyze the development of agency by estoppel in Ohio from the early cases which recognized no hospital liability whatsoever, to the recent decision of *Clark v. Southview Hospital & Family Health Center*,³¹ which virtually renders hospitals strictly liable for all negligent acts of their staff physicians.

A. The Cases Which Set The Stage

In 1911, the Supreme Court of Ohio, in *Taylor v. Protestant Hospital Ass'n*,³² adopted the doctrine of charitable immunity for hospitals. The *Taylor* court concluded vicarious liability should not apply to hospitals because they operated "solely for a public use and a public benefit."³³ Forty-five years later, in *Avellone v. St. John's Hospital*,³⁴ the court abolished charitable immunity for hospitals.³⁵ The *Avellone* court found that a tension existed between the right of nonprofit hospitals to derive any available benefit from society and the right of injured parties to seek recovery, which had shifted since the *Taylor* decision from favoring the hospitals to favoring injured parties.³⁶ In the court's view, the major factors contributing to this shift was the status of hospitals as

³¹628 N.E.2d 46 (Ohio 1994).

³²96 N.E. 1089 (Ohio 1911), *overruled by* *Avellone v. St. John's Hosp.*, 135 N.E.2d 410 (Ohio 1956).

³³96 N.E.2d at 1092. The court held: "A public charitable hospital, organized as such and open to all persons, although conducted under private management, is not liable for injuries to a patient of the hospital, resulting from the negligence of a nurse employed by it." *Id.* at 1089.

³⁴135 N.E.2d 410 (Ohio 1956).

³⁵The doctrine of charitable immunity for any charitable organization was later abolished in *Albritton v. Neighborhood Ctrs. Ass'n*, 466 N.E.2d 867 (Ohio 1984).

³⁶On the one hand there is the well recognized right of nonprofit hospitals to any benefit and assistance which society and the law can justly allow them—a right which they command by their very nature; and on the other hand we see the right of the individual injured by the negligence of a servant to look for recompense to the master of such servant, under *respondeat superior*.

Up to this point . . . this court has apparently felt that the benefit to society as a whole, gained by granting immunity, weighed the former right in favor of the latter, and this was on the ground that such masters were 'different from others,' and that immunizing them was a 'valuable aid in securing the ends of justice.'

In our opinion this conclusion is no longer justified.
135 N.E.2d at 414.

profitable businesses and the ability of hospitals to obtain liability insurance, which was not available at the time of the *Taylor* decision.³⁷

The first significant application of agency by estoppel was in 1941 by the Ohio Supreme Court in the context of a dispute between a store owner who had retained an independent contractor to sell meat on his premises. In *Rubbo v. Hughes Provision Co.*,³⁸ an owner of a market that leased space to independent dealers was found vicariously liable for the acts of an independent contractor who sold contaminated meat. The *Rubbo* court relied on the supreme court's discussion of estoppel in *Globe Indemnity Co. v. Wassman*,³⁹ where a surety was held estopped from denying liability for failure to comply with statutory provisions for such claims.⁴⁰ The *Globe* court found that for an estoppel to be created, representations need not be made to the specific party asserting estoppel, but rather could be made to a third person who would then communicate it to the plaintiff, to a class of persons of which the plaintiff is a member, or to the public in general.⁴¹ Using the definition of estoppel set forth by *Globe*, the *Rubbo* court clearly adopted the theory of apparent agency now embodied by Torts § 429.

³⁷The *Avellone* court stated:

The policy that the funds of a nonprofit hospital should not be diverted for any purpose other than the purpose for which it was organized, causing a depletion of the hospital's resources, and thus immunizing them from liability no longer has any foundation in our present day economy. Under present day conditions a hospital may fully protect its funds by the use of liability insurance, and, since such funds may be used to recompense those who are injured through the negligent selection of servants and strangers, there is no reason why such funds may not be used in the purchasing of insurance which will protect not only the hospital and its funds but also any person injured through its negligence or the negligence of its servants.

Id. at 415.

³⁸34 N.E.2d 202 (Ohio 1941). The court held:

Where the proprietor of a provision market advertises an article for sale in his market and a purchaser, in reliance that he was buying from such proprietor and without knowledge to the contrary, buys such advertised article at a counter in the market which the proprietor had leased to another, which counter was the only place in the market where the article in question was to be found, the doctrine of agency by estoppel applies, and in an action against such proprietor for injuries resulting from such sale, the proprietor will not be heard to deny that the lessee of the counter space was proprietor's agent.

Id. at 203.

³⁹165 N.E. 579 (Ohio 1929).

⁴⁰34 N.E.2d at 205.

⁴¹*Id.* at 204-05. In reaching this holding, the *Rubbo* court relied on 16 OHIO JURISPRUDENCE 604, § 50 and the *Globe* decision.

The *Rubbo* decision was subsequently applied by the Ohio Supreme Court in *Johnson v. Wagner Provision Co.*⁴² In *Johnson*, the plaintiff was attempting to impose liability upon a store owner in much the same situation as *Rubbo*, but the court found the plaintiff failed to establish an agency by estoppel because she failed to show actual reliance on the alleged agency relationship.⁴³ The *Johnson* court defined agency by estoppel as when "one has been led to rely upon the appearance of agency to his detriment . . . or some other change in position has occurred, in reliance upon the appearance of authority."⁴⁴ It appears the *Johnson* court disagreed with the lenient standard set forth by *Rubbo*, as it imposed a more stringent standard which is now embodied in Agency § 267.

Agency by estoppel was again applied by the Ohio Supreme Court in *Councell v. Douglas*.⁴⁵ The *Councell* court refused to hold the defendant liable under this doctrine since the plaintiff failed to show induced reliance on the alleged relationship or any harm resulting therefrom.⁴⁶ The court expressly relied on § 265 of the *RESTATEMENT OF AGENCY* and found that reliance is a requisite element of agency by estoppel.⁴⁷

Agency by estoppel was first extended beyond the commercial setting, to a hospital, in *Cooper v. Sisters of Charity*.⁴⁸ The plaintiff in *Cooper* attempted to apply agency by estoppel to a hospital which retained independent contractor physicians to treat patients in their emergency room.⁴⁹ The court rejected the plaintiff's argument, finding the hospital was not liable because the defendant-physician was an independent contractor employed by a third-party which the hospital had contracted with, and was not under the control of the defendant-hospital.⁵⁰ Looking to the *Johnson* holding, the court

⁴²49 N.E.2d 925 (Ohio 1943).

⁴³*Id.*

⁴⁴*Id.* at 928 (citations omitted).

⁴⁵126 N.E.2d 597 (Ohio 1955).

⁴⁶*Id.*

⁴⁷The court cited the following comment from *RESTATEMENT OF AGENCY* § 265:
The fact that a person manifests to a third person that another is his agent or servant does not of itself cause harm. It is only where there has been some reliance by a third person upon the appearance of a principal and agent or a master and servant relationship that such appearance can be the basis of liability, and then only if a subsequent harm is in some manner induced by the reliance. Except in such cases, therefore, a person is not liable for the . . . negligence . . . of an apparent servant or agent.

Id. at 601.

⁴⁸272 N.E.2d 97 (Ohio 1971).

⁴⁹*Id.*

⁵⁰*Id.*

found no induced reliance on the part of the plaintiff and, further, the court stated, "[T]he practice of medicine by a licensed physician in a hospital is not sufficient to create an agency by estoppel, as alleged by appellant."⁵¹

B. The Hannola Decision

Ohio first found a hospital liable for the tortious acts of a staff physician employed as an independent contractor in *Hannola v. City of Lakewood*.⁵² In *Hannola*, the court of appeals held that a hospital may not contract with a third party to insulate itself from liability for the acts of doctors who are independent contractors treating patients at a hospital.⁵³ The court relied on the doctrine of apparent agency in reaching their decision.

The plaintiff, Liisa Hannola, brought a wrongful death action against Lakewood Hospital, the City of Lakewood, Milton J. MacKay, M.D. and the West Shore Medical Care Foundation, Inc., alleging medical negligence on the part of all defendants, arising from the care and treatment her husband, the decedent, received at the Lakewood Hospital Emergency Room.⁵⁴ Defendants Lakewood Hospital and the City of Lakewood asserted they were immune from liability for any tortious acts that may have been committed, on the basis that the emergency room was operated by West Shore Medical Care Foundation as an independent contractor.⁵⁵

The court acknowledged the tension between the hospital's freedom to contract and the public's perception of a full-service hospital, but found, by operating emergency rooms, hospitals make "special statement[s] to the public."⁵⁶ The court concluded that a full-service hospital establishes an agency by estoppel by holding itself out to the public as a provider of comprehensive health care, which negates the hospital's ability to immunize itself from liability through contractual relationships with third parties.⁵⁷

The *Hannola* court adopted the definition of agency by estoppel set forth by the Ohio Supreme Court in *Rubbo v. Hughes Provision Co.*⁵⁸ and *Johnson v.*

⁵¹*Id.* at 104.

⁵²426 N.E.2d 1187 (Ohio Ct. App. 1980).

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶426 N.E.2d at 1190.

⁵⁷*Id.* The court stated:

In essence, an agency by estoppel is established by creating an effect: that is, the appearance that the hospital's agents, not independent contractors, will provide medical care to those who enter the hospital. The patient relies upon this as a fact and he believes he is entering a full-service hospital.

Id.

⁵⁸34 N.E.2d 202 (Ohio 1941). See text cited *supra* note 38.

*Wagner Provision Co.*⁵⁹ In applying these decisions, however, the court found that the doctrine should apply differently to a hospital than to a commercial enterprise as the latter may have more success in disclaiming agency through advertising.⁶⁰ The *Hannola* court commented that hospitals, specifically those with emergency rooms, deal with emergency situations which often result in the denial of a patient's ability to make a conscious, informed decision as to where they are treated and by whom.⁶¹ This reasoning of the *Hannola* court implied that a hospital cannot effectively disclaim agency.

To justify its departure from the supreme court's earlier decisions which refused to find a hospital liable for the acts of doctors retained as independent contractors,⁶² the *Hannola* court found that a "hospital," especially one with an emergency room, "makes a special statement to the public when it opens its emergency room to provide emergency care for people."⁶³

The *Hannola* court did not expressly state whether it looked to Agency § 267 or Torts § 429, but did refer to the *Johnson* decision for its definition of agency

⁵⁹49 N.E.2d 925 (Ohio 1943). The *Johnson* court defined agency by estoppel as: The doctrine of agency by estoppel, as it might be invoked by a plaintiff in a tort action, rests upon the theory that one has been led to rely upon the appearance of agency to his detriment. It is not applicable where there is no showing of induced reliance upon an ostensible agency.

Id. at 926. *Hannola v. City of Lakewood*, 426 N.E.2d 1187, 1189 (Ohio Ct. App. 1980).

⁶⁰426 N.E.2d at 1190.

⁶¹*Id.*

⁶²*See Cooper v. Sisters of Charity*, 272 N.E.2d 97 (Ohio 1971):

We find no error in the trial court's determination that appellee Sisters of Charity were not liable for the negligence of appellees Dr. Hansen and Emergency Professional Service Group, should that be established . . . Appellee Dr. Hansen was an employee of appellee Emergency Professional Service Group, and was not under the control of the hospital . . . Moreover, the practice of medicine by a licensed physician in a hospital is not sufficient to create an agency by estoppel, as alleged by appellant. Nowhere is 'induced reliance' shown by the appellant . . .

Id. at 104.

⁶³426 N.E.2d at 1190. The court quoted Jeffrey S. Leonard, Note, *Independent Duty of a Hospital to Prevent Physicians' Malpractice*, 15 ARIZ. L. REV. 953, 967 (1973), for support of its view of the modern hospital:

The image of modern hospitals as centers of medical practice of the highest quality is understandably cultivated by the hospitals themselves. Nonprofit hospitals do not, of course, advertise as such. But they do maintain a high degree of 'visibility' in the community through fund-raising campaigns, community relations programs, public service programs, press releases and the like, all presenting the hospital as a unified institution vital to community health, rather than as a mere physical shell in which private physicians practice their profession.

426 N.E.2d at 1190.

by estoppel.⁶⁴ *Hannola* construed the *Johnson* test as a hybrid of these Restatement sections. However, if Agency § 267 were strictly applied by the *Hannola* court, the plaintiff would have been required to show that her decedent actually thought the emergency room physician, who rendered the negligent treatment, worked for the defendant. Instead, the court applied Agency § 267 by requiring the plaintiff to show a representation, but then clearly shifted to Torts § 429 when it found the plaintiff's reliance on the reputation of the hospital sufficient to meet the test.⁶⁵ This intermingling of Restatement sections began the confusion in Ohio regarding agency by estoppel and apparent agency.⁶⁶

C. Albain v. Flower Hospital: Strict Adherence to § 267

A decade after the *Hannola* decision, the Ohio Supreme Court addressed the issue of agency by estoppel previously addressed at the appellate level. In *Albain v. Flower Hospital*,⁶⁷ the Ohio Supreme Court redefined the standard a plaintiff must meet in order to successfully assert agency by estoppel. The court rejected the appellate court's holding in *Hannola*, that the mere granting of staff privileges by a hospital to a physician constitutes "control" for purposes of establishing an agency by estoppel,⁶⁸ and redefined what test should be applied by a court in order to determine whether an apparent agency has been created.⁶⁹

Recognizing that courts across the nation look to Agency § 267, Torts § 429, or both, the *Albain* court expressly adopted Agency § 267, which the court felt was consistent with their prior decisions in *Rubbo*, *Johnson*, and *Council*.⁷⁰ The court reasoned that strict adherence to § 267 was preferable over the hybrid adopted by *Hannola*.⁷¹ The *Hannola* court found the mere existence of a hospital

⁶⁴*Id.* at 1189.

⁶⁵*Id.* at 1191.

⁶⁶For further discussions on *Hannola v. City of Lakewood*, see Ruth Bope Dangel, Case Comment, *Hospital Liability for Physician Malpractice: The Impact of Hannola v. City of Lakewood*, 47 OHIO ST. L.J. 1077 (1986).

⁶⁷553 N.E.2d 1038 (Ohio 1990), overruled in part by *Clark v. Southview Hosp.*, 628 N.E.2d 46 (Ohio 1994).

⁶⁸The *Albain* court stated: "A hospital's granting of staff privileges to an independent private physician, which the hospital may later revoke under its review procedures, does not establish the requisite level of authority or control over such physician to justify imposing liability against the hospital under the doctrine of respondeat superior." 553 N.E.2d at 1040.

⁶⁹*Id.* at 1049.

⁷⁰*Id.*

⁷¹The *Albain* court stated:

The *Hannola* analysis rests on two faulty premises. First, that court relies on the theory of independent duty which we have rejected above. Second, that court holds that, *in every case*, an implied induce-

emergency room constituted a "holding out" to the public that the hospital controlled the acts of its emergency room physicians.⁷² However, the *Albain* court determined that this finding directly contradicted the policy set forth by *Cooper*⁷³: "[T]he practice of medicine by a licensed physician in a hospital is not sufficient to create an agency by estoppel."⁷⁴

The *Albain* court held that in order for a hospital to be liable for the acts of physicians retained as independent contractors under the theory of agency by estoppel, a plaintiff must show the following factors: "(1) the hospital made representations leading the plaintiff to believe that the negligent physician was operating as an agent under the hospital's authority, and (2) the plaintiff was thereby induced to rely upon the ostensible agency relationship."⁷⁵ The court stated that the outcome of the second prong of this test would turn on whether the plaintiff relied on the ostensible agency relationship between the hospital and the doctor, rather than the reputation of the hospital.⁷⁶

In *Albain*, Sharon Albain and her husband filed a wrongful death action against the hospitals and doctors which treated Sharon for fetal distress, alleging that the defendants were negligent in the care and treatment of her in the Flower Hospital Emergency Room. Noting that reliance is rarely present in emergency situations, the court found no evidence which established that the appellee-patient relied on an agency relationship between the independent contractor-physician and the appellant-hospital.⁷⁷ In making this determination, the court analyzed whether the on-call, staff physician ever discussed her employment status with the patient, the beliefs of the patient as to whether emergency room physicians were employees of the hospital, and whether the hospital made any representations to the patients as to the employment status of their physicians.⁷⁸

Undoubtedly, the *Albain* test set forth a strict standard for a plaintiff to meet, but this decision was consistent with the legal principles embodied in the Restatement and Ohio precedent. Unlike the hybrid set forth by *Hannola*, the

ment 'is established by creating an effect.' In that court's view, the mere existence of a hospital with emergency room facilities constitutes an inducement that all its physicians therein are acting under the hospital's direction and control. This is hardly consistent with that court's statement that the mere practice of medicine by a licensed physician in a hospital is insufficient to create an agency by estoppel.

Id.

⁷²426 N.E.2d 1187, 1190-91 (Ohio Ct. App. 1980).

⁷³272 N.E.2d 97, 104 (Ohio 1971).

⁷⁴553 N.E.2d 1038, 1049 (Ohio 1990).

⁷⁵*Id.* (citations omitted).

⁷⁶*Id.* at 1049-50.

⁷⁷*Id.* at 1050.

⁷⁸553 N.E.2d at 1050.

Albain test looked to sound legal doctrine for its application of agency by estoppel, rather than inventing a means of imposing liability based solely on public policy grounds.

D. The Ohio Supreme Court Revisits and Reverses Albain: Clark v. Southview Hospital

On March 16, 1994, in *Clark v. Southview Hospital & Family Health Center*,⁷⁹ the Supreme Court of Ohio overturned, in part, its decision in *Albain*. *Clark* rejected *Albain*'s strict adherence to Agency § 267 and, instead, chose to adopt a more refined version of the hybrid of Agency § 267 and Torts § 429 previously set forth by the appellate court in *Hannola*.⁸⁰

In *Clark*, the decedent, Kimberly Sierra, was treated by an emergency-room physician, Thomas Mucci, D.O., at Southview Hospital's Emergency Room (ER), on August 25, 1986 for an asthma attack from which she subsequently died.⁸¹ Dr. Mucci was the president and sole shareholder of TMES, Inc., which contracted with Southview to provide twenty-four hour physician staffing for Southview's ER.⁸² The appellant, Edna K. Clark, alleged wrongful death as a result of medical negligence on "the part of Southview through its agents and/or employees, Dr. Mucci and TMES."⁸³ *Clark* settled with Dr. Mucci and TMES prior to trial.⁸⁴

At trial, *Clark* testified she advised her daughter to go to Southview's ER in a medical emergency, as Southview had physicians on duty twenty-four hours.⁸⁵ She also stated she knew of Southview's ER from Southview's administration department as well as from promotional materials distributed by the hospital.⁸⁶ *Clark* further testified that, from these sources, she formed the belief that the physicians who worked at Southview's ER, "worked for the hospital and were hospital doctors," and that she relayed this information to the decedent.⁸⁷ According to her testimony, she was never informed otherwise.⁸⁸ The promotional material produced by Southview and admitted into evidence, did not mention TMES nor whether the physicians who staffed

⁷⁹628 N.E.2d 46 (Ohio 1994).

⁸⁰*Id.*

⁸¹*Id.* at 46-47.

⁸²*Id.* at 47.

⁸³628 N.E.2d at 47.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷628 N.E.2d at 47.

⁸⁸*Id.*

their ER were employees or independent contractors.⁸⁹ The trial court ruled in favor of the plaintiff, Clark.⁹⁰

The Appellate Court of Montgomery County reversed on the grounds that the plaintiff-administratrix failed to meet the *Albain* test, which required her to show the following: (1) the hospital made representations leading Kimberly Sierra, the decedent, to believe that Dr. Mucci was an employee of Southview, and (2) the decedent was thereby induced to rely upon the ostensible agency relationship to prove agency by estoppel.⁹¹ The appellate court found insufficient evidence to meet the first part of this test; that Southview had made affirmative representations to the decedent or the public that their ER physicians, including Dr. Mucci, were employees of the hospital.⁹²

In reviewing the appellate court's decision, the Ohio Supreme Court did not find fault with the lower court's application of the *Albain* test, but rather with the *Albain* decision itself.⁹³ Refusing to follow the doctrine of *stare decisis*, the Clark court partially overturned *Albain*, based on the following criticisms: (1) *Albain* defined the doctrine of agency by estoppel too narrowly; (2) *Albain* misinterpreted Michigan's test for agency by estoppel set forth in *Grewe v.*

⁸⁹The promotional and marketing materials of Southview which were admitted into evidence consisted of various pamphlets, brochures and an 'Emergency Handbook & Physician Directory.' Also admitted into evidence were various newspaper advertisements and the contents of radio and television advertisements. . . . [T]he promotional literature contains statements such as: 'We welcome the opportunity to serve our community in this way, to supplement our full range of inpatient and outpatient medical care'; 'You'll find facts about the hospitals' emergency departments'; . . . 'At Southview's emergency department, we treat whole people, not just diseases and traumatic injuries'; 'Get more information about our emergency facilities'; 'Paramedics call the emergency department from the scene, and by the time the patient is stabilized and brought to the hospital, the surgical team is ready'; 'Southview Hospital provides the full range of patient care'; and 'Our business is your good health, not just the cure of ill health.'

Id.

⁹⁰*Id.* at 48.

⁹¹Clark v. Southview Hosp. & Family Health Ctr., Nos. 12845 & 13060, 1992 Ohio App. LEXIS 4516 (Sept. 2, 1992) [citing *Albain*, 553 N.E.2d 1038 (Ohio 1990)].

⁹²1992 Ohio App. LEXIS at *11-12.

⁹³In attempting to apply *Albain* to the facts of this case, we find ourselves questioning the very basis of the holding. . . . [W]e are not unmindful of the doctrine of *stare decisis* which dictates adherence to judicial decisions. *Stare decisis*, however, was not intended to effect a 'petrifying rigidity,' but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to follow it. 628 N.E.2d 46, 48-49 (Ohio 1994) [quoting Bing v. Thunig, 143 N.E.2d 3, 9 (N.Y. Ct. App. 1957)].

Mount Clemens General Hospital;⁹⁴ (3) *Albain* also misinterpreted Ohio's prior adoption of agency by estoppel in *Rubbo*;⁹⁵ and (4) the second prong of *Albain's* test made it "virtually impossible" for a plaintiff, especially in a wrongful death case, to establish reliance.⁹⁶

The *Clark* court found *Albain* misinterpreted both *Rubbo* and *Grewe* by requiring a showing of induced reliance, the second prong of the *Albain* test.⁹⁷ Looking to nationwide applications of agency by estoppel, *Clark* overruled *Albain's* second prong, finding that no other jurisdiction had applied agency by estoppel as strictly.⁹⁸

Like *Hannola*, the *Clark* court chose to ignore both *Johnson's* and *Councell's* requirement of demonstrating induced reliance in order to find agency by estoppel. Instead, the court refused to expressly adopt Agency § 267 or Torts § 429, and set forth a hybrid of the two, similar to that in *Hannola*. *Clark* held a hospital may be liable under agency by estoppel where: (1) "it holds itself out to the public as a provider of medical services" and (2) "in the absence of notice or knowledge to the contrary, the patient looks to the hospital, as opposed to the individual practitioner, to provide competent medical care."⁹⁹

The supreme court justified its departure from *Albain* on the grounds of public policy and the holdings of other jurisdictions.¹⁰⁰ The court commented that nearly every jurisdiction's test for establishing agency by estoppel complied with Ohio's decision in *Rubbo*, rendering *Albain's* requirement of establishing reliance on the alleged agency relationship erroneous.¹⁰¹ Furthermore, the court reasoned that their decision to weaken the requirements for agency by estoppel was consistent with public policy.¹⁰² In the court's view, the modern hospital is an industrialized, "complex full-service institution[], [and] the emergency room has become the community medical center, serving as the portal of entry to the myriad of services available at the hospital."¹⁰³ This view, according to the court, along with the hospital industry's overall use of the media for advertising, justifies the public's expectation and assumption "that the hospital is the medical provider it purports to be."¹⁰⁴

⁹⁴273 N.W.2d 429 (Mich. 1978).

⁹⁵34 N.E.2d 202 (Ohio 1941). See discussion *supra* Section III.A.

⁹⁶628 N.E.2d at 49-52.

⁹⁷*Id.* at 52.

⁹⁸*Id.* at 50.

⁹⁹*Id.* at 53.

¹⁰⁰628 N.E.2d at 53-54.

¹⁰¹*Id.* at 52.

¹⁰²*Id.* at 53.

¹⁰³*Id.*

¹⁰⁴628 N.E.2d at 53.

Under the *Clark* test, the only available defense to a hospital is to prove the injured party had notice or knowledge that the treating physician was not employed by the hospital.¹⁰⁵ This standard is nearly impossible for a defendant-hospital to meet, as patients, in the context of an emergency situation, are often unconscious or in an otherwise traumatic situation, leaving little if no opportunity to supply a patient with such knowledge. The *Clark* decision gives no suggestion as to how a defendant can overcome this hurdle and does nothing to aid defendants in such circumstances.

Clark requires notice to be given at "a meaningful time," but fails to direct how such notice may be effected.¹⁰⁶ The court expressly rejected the suggestion that an emergency room could post signs to notify patients that the physicians therein were independent contractors rather than employees of the hospital, in an attempt to disclaim this liability.¹⁰⁷ The *Clark* court found such notice would not be "meaningful," as a patient, by presenting herself to the emergency room, has already formed a belief about the hospital and/or its emergency room: "Even if the patient understood the difference between an employee and an independent-contractor relationship, informing her of the nature of the relationship after she arrives is too late."¹⁰⁸

Chief Justice Moyer, in his dissent to the *Clark* decision, stated the "majority of the court persists in its eagerness to overrule recent and well-reasoned precedent," that the facts presented satisfied the *Albain* test for agency by estoppel, and overturning *Albain* was unnecessary.¹⁰⁹ Moyer commented that rather than overturning *Albain*, the court could have softened its holding if it felt it was too harsh a standard for a plaintiff to meet, by refusing to follow the dicta set forth by *Albain* in regard to the means by which a plaintiff could establish that she was induced to rely.¹¹⁰ The Chief Justice based his dissent, in part, on his opinion that the court's new test imposed too harsh a standard for

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 54.

¹⁰⁷*Id.* at 54 n.1.

¹⁰⁸628 N.E.2d at 54 n.1 ("The purpose of any notice requirement is to impart knowledge sufficient to enable the plaintiff to exercise an informed choice. The signs suggested by the dissent are too little, too late.") (quoting from, Steven R. Owens, Note, *Pamperin v. Trinity Memorial Hospital and the Evolution of Hospital Liability: Wisconsin Adopts Apparent Agency*, 1990 Wis. L. REV. 1129, 1147).

¹⁰⁹628 N.E.2d at 55.

¹¹⁰If the *Albain* standard unduly limits the class of potential plaintiffs, the more jurisprudentially sound approach would be to modify, interpret or soften the holding of that case instead of conducting the radical surgery performed by the majority opinion. For example, this court could choose not to follow the dicta in *Albain* that the plaintiff prove that he or she would have refused treatment had he or she known of the agency relationship. This is the difference between the incremental development of the common law and judicial legislation.

Id. at 56 (citation omitted).

a defendant-hospital to meet, and would only result in an escalation of the continuing rise of health care costs.¹¹¹

Of the few reported decisions which apply the *Clark* decision, *Costell v. Toledo Hospital*¹¹² undoubtedly provides the most thorough discussion. In *Costell*, the trial court's grant of summary judgment to the defendant-hospital was reversed, based on the appellate court's finding that the plaintiff satisfied the elements of the *Clark* test.¹¹³ The significance of the *Costell* decision rests in its extension of agency by estoppel from physicians in the emergency room to an anesthesiologist, who assisted in the decedent's surgery.¹¹⁴ The court concluded that this extension was warranted as, "Appellant's late husband . . . never had to make an affirmative choice about who would be the anesthesiologist at the surgery. Indeed, as appellant points out, her late husband never met the anesthesiologist until he entered the operating room."¹¹⁵

Further application of the *Clark* decision occurred in *Stovall v. Brown Memorial Hospital*,¹¹⁶ and *Doe v. Ohio State University Hospital & Clinics*.¹¹⁷ In *Doe*, the plaintiff sought to apply the *Clark* test in order to hold the Ohio State University Hospital liable for a doctor's failure to obtain the plaintiff's consent to an HIV test.¹¹⁸ Although the *Doe* court determined an agency by estoppel was created, the hospital escaped liability due to the plaintiff's failure to satisfy other elements of his claim.¹¹⁹ Likewise, the defendant-hospital in *Stovall* escaped liability, although solely due to the plaintiff's failure to meet the elements of the *Clark* test.¹²⁰

Thus, although there are few opinions which construe the *Clark* decision, it can be inferred from the *Costell* ruling that the doctrine of agency by estoppel will continue to be expanded in Ohio courts.

¹¹¹*Id.* at 55.

¹¹²649 N.E.2d 35 (Ohio Ct. App. 1994).

¹¹³*Id.* at 41.

¹¹⁴*Id.* at 40.

¹¹⁵*Id.* at 41.

¹¹⁶No. 94-A-0022, 1994 Ohio App. LEXIS 5703 (Ohio Ct. App. Dec. 16, 1994).

¹¹⁷No. 94API11-1625, 1995 Ohio App. LEXIS 4087 (Ohio Ct. App. Sept. 19, 1995).

¹¹⁸*Id.* at *13.

¹¹⁹"[T]he fact remains that plaintiff has failed to demonstrate that [the defendant-physician] 'knowingly' violated R.C. 3701.242(A). If plaintiff wishes to hold defendant, as principal, responsible for the 'wrongful' acts of its agent, . . . then [the doctor] must have violated the statute in some way." *Id.* at *15-16.

¹²⁰The *Stovall* court refused to find an agency by estoppel as there was clear and uncontroverted evidence of a prior physician-patient relationship (of over 20 years in duration) between the plaintiff and the physician at issue. 1994 Ohio App. LEXIS 5703 at *8.

IV. HOW AGENCY BY ESTOPPEL IS APPLIED NATIONWIDE

Courts across the nation have failed to recognize the distinction between Agency § 267 and Torts § 429. Agency § 267 sets forth the standard by which an agency by estoppel is created, and requires a plaintiff to show: (1) actual reliance on the identity of the principal; and (2) that this reliance caused the plaintiff to be exposed to the negligent conduct.¹²¹

Torts § 429 sets forth the standard by which an apparent agency is created, and is a more lenient standard than Agency § 267 as it does not require an estoppel.¹²² Instead, Torts § 429 requires proof of a "holding out" by the apparent principal which would lead a reasonable person to conclude an agency relationship existed.¹²³

Clearly, the elements of Agency § 267 are more difficult to meet, as a causal relationship between the apparent principal's conduct and the plaintiff's change of position in reliance must be shown.¹²⁴ Torts § 429 does not require an establishment of such a causal relationship.¹²⁵

The *Clark* court correctly stated that the standard it set forth for agency by estoppel is consistent with the vast majority of jurisdictions which have adopted agency by estoppel to a hospital setting.¹²⁶ However, many of the decisions cited by *Clark* in support of its holding erroneously claimed to adopt Agency § 267, when in actuality, they adopted the more lenient standard contained in Torts § 429. Ironically, the *Albain* decision, overruled by *Clark*, was one of very few decisions which correctly construed Agency § 267 by holding that a plaintiff must show *actual reliance* in order to successfully plead agency by estoppel. Disliking the strict standard correct application of Agency § 267 imposed on a plaintiff under the *Albain* ruling, the *Clark* court avoided the issue of whether to apply Agency § 267 or Torts § 429 by refusing to expressly adopt either section.

¹²¹See *supra* note 21 and accompanying text. See also Janulis & Hornstein, *supra* note 19.

¹²²RESTATEMENT (SECOND) OF AGENCY § 8B, cmt. a (1958), states:
Estoppel is fundamentally a doctrine in the law of torts, sometimes operating by creating liability, sometimes by denying a cause of action which might otherwise accrue. . . . Its operation may create a defense to an action or may give compensation to a person who otherwise would be harmed by action which he had taken in reliance upon an erroneous belief, either caused by the one estopped or not corrected by him when he should have done so.

¹²³See *supra* note 20. See also Janulis & Hornstein, *supra* note 19.

¹²⁴See Janulis & Hornstein, *supra* note 19, at 696-97.

¹²⁵*Id.*

¹²⁶628 N.E.2d 46, 50 (Ohio 1994).

Clark also correctly concluded that the majority of jurisdictions which have adopted agency by estoppel followed the approach taken by Michigan.¹²⁷ Like Clark, *Grewe* did not expressly adopt Agency § 267 or Torts § 429. In fact, *Grewe* made no mention of either section. Instead, *Grewe* based its adoption of agency by estoppel solely on a 1942 California appellate decision.¹²⁸

Grewe's adoption of agency by estoppel may be one of the sources of the nationwide misapplication of this doctrine. In *Grewe*, the defendant-hospital was found vicariously liable for the negligent conduct of an orthopedic resident retained by the hospital as an independent contractor.¹²⁹ The Michigan Supreme Court expressly imposed vicarious liability on the theory of agency by estoppel but failed to require a causal relationship.¹³⁰ The *Grewe* court adopted the three-prong test for establishing agency by estoppel set forth by *Stanhope*:

The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; . . . such belief must be generated by some act or neglect of the principal sought to be charged; . . . and the third person relying on the agent's apparent authority must not be guilty of negligence.¹³¹

Consequently, *Grewe's* labeling of its test as agency by estoppel, rather than apparent agency, is a misnomer as the *Stanhope* test adopted by *Grewe* is actually the standard contained in Torts § 429. Other jurisdictions which referred to and/or relied on the *Grewe* decision, when determining how to apply this doctrine to a hospital setting, may have exacerbated *Grewe's* misnomer by innocently attempting to comport that decision with legal doctrines contained in the Restatements.

The ensuing discussion will survey how state courts across the country define and apply agency by estoppel under Agency § 267 and apparent agency under Torts § 429. As this discussion will demonstrate, many courts, when initially faced with determining how agency by estoppel should be applied to a hospital setting, claimed to adopt Agency § 267, but erroneously negated the requisite element of reliance. These courts failed to recognize that they actually adopted Torts § 429, the more lenient standard. This negation resulted in an abrogation of Agency § 267 and, moreover, a means by which a state can hold a hospital, in essence, strictly liable for negligent treatment by their physicians retained as independent contractors.

¹²⁷*Id.* at 52; see *Grewe v. Mount Clemens Gen. Hosp.*, 273 N.W.2d 429 (Mich. 1978).

¹²⁸273 N.W.2d at 434; see *Stanhope v. Los Angeles College of Chiropractic*, 128 P.2d 705 (Cal. Ct. App. 1942).

¹²⁹273 N.W.2d at 437.

¹³⁰*Id.* at 429.

¹³¹*Id.* at 434 (quoting *Stanhope*, 128 P.2d at 708).

A. The States That Correctly Follow § 429 of the Second Restatement of Torts

Few jurisdictions have expressly adopted Torts § 429 as legal authority for their adoption of apparent agency (often erroneously called agency by estoppel). Torts § 429 requires a plaintiff to show the injured party accepted the independent contractor's services under the reasonable belief that the employer was providing the care.¹³² Essentially, this section requires a "holding out" by the employer and a belief on the part of the plaintiff in said "holding out."¹³³

The first decision to correctly apply apparent agency under Torts § 429 was *Mduba v. Benedictine Hospital*,¹³⁴ decided by the Appellate Division of the Supreme Court of New York in 1976. The *Mduba* court found Torts § 429 to be the applicable legal principle, and stated:

It is, therefore, our conclusion that the defendant hospital, having held itself out to the public as an institution furnishing doctors, staff and facilities for emergency treatment, was under a duty to perform those services and is liable for the negligent performance of those services by the doctors and staff it hired and furnished to decedent. Certainly, the person who avails himself of hospital facilities has a right to expect satisfactory treatment from any personnel who are furnished by the hospital.¹³⁵

Citing the *Mduba* decision, the Pennsylvania Superior Court adopted "ostensible agency" in *Capan v. Divine Providence Hospital*.¹³⁶ *Capan* rejected the traditional notion that a hospital should not be held vicariously liable because it does not "undertake to treat the patient," on their conclusion that this notion is no longer the reality for modern-day hospitals.¹³⁷

The *Capan* court expressly adopted Torts § 429 and looked to the *Mduba* decision, among others.¹³⁸ The court stated that it based its extension of vicarious liability for hospitals on the frequently cited rationale of the Supreme Court of New York, in *Bing v. Thunig*:

The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish

¹³²See *supra* note 20.

¹³³See Janulis & Hornstein, *supra* note 19.

¹³⁴384 N.Y.S.2d 527 (N.Y. App. Div. 1976).

¹³⁵*Id.* at 529-30.

¹³⁶430 A.2d 647 (Pa. Super. Ct. 1980).

¹³⁷*Id.* at 649.

¹³⁸*Id.*

facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action.¹³⁹

In the mid-1980's, both Oklahoma and Mississippi decided cases factually similar to Ohio's decision in *Hannola*. Oklahoma's Appellate decision, *Smith v. St. Francis Hospital, Inc.*, expressly adopted Torts § 429, and set forth the following oft-cited quoted: "In our view, the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems."¹⁴⁰ The Mississippi Supreme Court, in *Hardy v. Brantley* relied on both *Smith* and *Hannola* for its application of Torts § 429 and formulated an explicit test thereunder.¹⁴¹

In a rare decision to acknowledge the distinction between Agency § 267 and Torts § 429, the Supreme Court of Alaska chose to apply the latter in *Jackson v. Power*.¹⁴² The *Jackson* court concluded that Torts § 429 is the basis for ostensible or apparent agency, while Agency § 267 is the basis for the agency by estoppel doctrine and, moreover, that these terms should not be used interchangeably.¹⁴³ Relying on a prior application of apparent agency to a commercial case, the court chose to apply Torts § 429 on the grounds that Alaska's prior application of ostensible agency to commercial cases provided sufficient guidelines for medical malpractice cases.¹⁴⁴

¹³⁹*Id.* [citing *Bing*, 143 N.E.2d 3, 8 (N.Y. Ct. App. 1957)].

¹⁴⁰676 P.2d 279, 282 (Okla. Ct. App. 1983).

¹⁴¹471 So.2d 358 (Miss. 1985). The *Hardy* court held:

Where a hospital holds itself out to the public as providing a given service, in this instance, emergency services, and where the hospital enters into a contractual arrangement with one or more physicians to direct and provide the service, and where the patient engages the services of the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment, the doctrine of respondeat superior applies . . . [W]here a patient engages the services of a particular physician who then admits the patient to a hospital where the physician is on staff, the hospital is not vicariously liable for the neglect or defaults of the physician.

Id. at 371.

¹⁴²743 P.2d 1376 (Alaska 1987).

¹⁴³The *Jackson* court determined that under § 429, also known as ostensible or apparent agency, a plaintiff must establish: "(1) whether the patient looks to the institution, rather than the individual physician, for care; and (2) whether the hospital 'holds out' the physician as its employee. [While under Section 267], the arguably stricter standard . . . there must be actual reliance upon the representations of the principal by the person injured." *Id.* at 1380 (citations omitted).

¹⁴⁴*Id.*

Connecticut chose to expand its application of apparent authority beyond commercial issues in *Francisco v. Hartford Gynecological Center*¹⁴⁵ and found a hospital vicariously liable, under Torts § 429, for the negligence of a nurse retained as an independent contractor, citing overwhelming policy reasons for their extension of this doctrine.¹⁴⁶ Although this case applied to a nurse, rather than a physician, it is doubtful Connecticut will refrain from applying apparent authority to a hospital where a staff physician/independent contractor is negligent as well, as the *Francisco* court based its holding on numerous decisions which applied agency by estoppel/apparent agency to hospitals with physicians practicing as independent contractors.¹⁴⁷

The above-referenced jurisdictions represent a minority of state courts which correctly apply the test for apparent agency or agency by estoppel as they claim to propound. The majority of jurisdictions claim to adopt Agency § 267 as the basis for their applications of agency by estoppel rather than Torts § 429. However, as the ensuing discussion will demonstrate, these claims are erroneous as, in reality, these courts are actually mislabeling the elements of Torts § 429.

B. The Nationwide Misconstruction and Misapplication of § 267

This section surveys the state courts which expressly adopted Agency § 267, and how they applied this test. The majority of states which expressly adopt Agency § 267 fail to correctly construe the requisite elements of this section. To satisfy the elements of Agency § 267, a plaintiff must show: (1) a representation by the hospital that the allegedly negligent physician is a servant or agent of the hospital; and (2) the injured party must have justifiably relied upon the skill or care of the apparent agent to her detriment.

Most state courts apply agency by estoppel as a hybrid of Agency § 267 and Torts § 429. These courts generally require a representation by the hospital which is satisfied if a hospital held itself out as a provider of medical care, thus meeting both Agency § 267 and Torts § 429. The application of the second element of Agency § 267 is where these courts are mistaken.

¹⁴⁵No. CV 92-0513841 S, 1994 Conn. Super. LEXIS 521 (Mar. 1, 1994).

¹⁴⁶The court cited the following policy reasons:

(1) The center here agreed to perform certain surgical procedures for the plaintiff . . . ; (2) When a patient agrees to have a surgical procedure performed at a hospital or medical center, she has a right to rely on the reputation of the hospital . . . ; (3) A person enters a hospital or goes to a medical center for a wide range of services rather than treatment by a particular health professional . . . ; (4) Public outrage would surely follow an announcement by a medical center or hospital 'that it regards all staff doctors as completely independent professionals, conducts no supervision of their performance and takes no interest in their competence.'

Id. at ** 8-9 [quoting *Hannola v. Lakewood*, 426 N.E.2d 1187, 1191 (Ohio Ct. App. 1980)].

¹⁴⁷1994 Conn. Super. LEXIS at * 4-5.

The second prong of Agency § 267 requires a plaintiff to show actual reliance upon the apparent authority of the hospital to control the allegedly negligent physician. Instead of adhering to this requirement, many courts find "implied reliance" and allow the second part of Agency § 267 to be satisfied upon a showing of a reasonable belief that the particular hospital was rendering the care in question. As a result, these courts typically formulate Agency § 267 to require: (1) a holding out by the hospital which would cause a reasonable person to assume that the hospital's physicians are its employees; and (2) that the injured party looked to the hospital to provide competent medical care.

By allowing a plaintiff to satisfy the second element of Agency § 267 by showing that she looked to the hospital to provide competent medical care, these courts allow a plaintiff to satisfy Agency § 267 without showing actual reliance. Such a construction of Agency § 267 results in an abrogation of agency by estoppel, a doctrine firmly based on common understanding of vicarious liability and agency theory. As such, Agency § 267 is rendered virtually identical to Torts § 429.

The misapplication of the second prong of Agency § 267 may derive its origins from two of the leading cases in the context of agency by estoppel, *Mehlman v. Powell*¹⁴⁸ and *Grewe v. Mount Clemens General Hospital*.¹⁴⁹ In *Grewe*, the Supreme Court of Michigan adopted the three prong test set forth by the State of California in *Stanhope v. Los Angeles College of Chiropractic*,¹⁵⁰ for determining whether an emergency room staff physician was the ostensible agent of the hospital.¹⁵¹ Citing the plaintiff's testimony, which established his expectation to be treated by an employee of the hospital rather than a specific physician, and a lack of evidence of a pre-existing physician-patient relationship between the negligent physician and the plaintiff, the Michigan Supreme Court upheld the finding that the hospital was vicariously liable.¹⁵² The *Grewe* court did not expressly adopt either Agency § 267 or Torts § 429.

Also relying on *Stanhope* as precedent, the Maryland Court of Appeals adopted agency by estoppel in 1977 in *Mehlman v. Powell*.¹⁵³ *Mehlman* concluded a plaintiff may "rely" on a hospital to provide competent, complete medical care due to the court's conclusion that hospitals are "engaged in the

¹⁴⁸378 A.2d 1121 (Md. Ct. App. 1977).

¹⁴⁹273 N.W.2d 429 (Mich. 1978).

¹⁵⁰128 P.2d 705 (Cal. Ct. App. 1942).

¹⁵¹273 N.W.2d at 434. The court stated:

First[,] the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; second[,] such belief must be generated by some act or neglect of the principal sought to be charged; third[,] and the third person relying on the agent's apparent authority must not be guilty of negligence.

(quoting *Stanhope*, 128 P.2d at 708).

¹⁵²273 N.W.2d at 434.

¹⁵³378 A.2d 1121 (Md. Ct. App. 1977).

business of providing health care services."¹⁵⁴ As *Mehlman* was the first decision to read Agency § 267 as allowing reliance to be implied from the appearance of a hospital, it is possible that *Mehlman* is the basis for the subsequent misapplication of Agency § 267 by other state courts.

To reach their conclusion, the *Mehlman* court distinguished its prior decision of *B.P. Oil Corp. v. Mabe*,¹⁵⁵ where the majority refused to find the defendant liable under agency by estoppel as, in the *Mehlman* court's opinion, it was common knowledge that gas/service stations are often independently owned.¹⁵⁶ By making the distinction between franchised service stations and hospital emergency rooms, it appears the *Mehlman* court concluded that it is not common knowledge that hospitals typically staff their facilities with physicians working as independent contractors. Neither finding is supported by any evidence, nor does it appear the question of such "common knowledge" was submitted to a jury. Therefore, because of this lack of evidentiary support for their conclusions regarding what is common knowledge, it is apparent the *Mehlman* court engaged in judicial legislation by extending agency by estoppel to hospitals on a mere implication of reliance.

In *Adamski v. Tacoma General Hospital*,¹⁵⁷ the Washington Court of Appeals also looked to the *Stanhope* decision for guidance when faced with the question of whether agency by estoppel could be applied to a medical malpractice case. *Adamski* looked to the defendant-hospital's "holding out" as a provider of emergency medical care services to the public, and concluded a jury could reasonably find the allegedly negligent physician was an apparent agent of the defendant-hospital.¹⁵⁸ For further support of this conclusion, the court looked to the plaintiff's discharge instructions which informed him he could return to the emergency room for follow-up care if necessary, and the fact that these discharge papers had the hospital's letterhead printed on them.¹⁵⁹ However, the *Adamski* court said nothing about the plaintiff's actual beliefs or reliance on the apparent agency.

Relying on the "appearance" of the hospital, Florida, like Michigan, Maryland and Washington, looked to the *Stanhope* decision for its adoption of agency by estoppel in *Irving v. Doctors Hospital of Lake Worth, Inc.*¹⁶⁰ Florida expressly adopted Agency § 267, but, per usual, deviated from a strict construction of that section.¹⁶¹

¹⁵⁴*Id.* at 1124.

¹⁵⁵370 A.2d 554 (Md. Ct. App. 1977).

¹⁵⁶378 A.2d at 1124.

¹⁵⁷579 P.2d 970 (Wash. Ct. App. 1978).

¹⁵⁸*Id.* at 979.

¹⁵⁹*Id.*

¹⁶⁰415 So.2d 55 (Fla. Dist. Ct. App. 1982).

¹⁶¹The *Irving* court stated:

In those cases where it can be shown that a hospital, by its actions, has

Agency § 267 was also misapplied by Texas in *Brownsville Medical Center & Valley Community Hospital v. Garcia*.¹⁶² The *Brownsville* court found the hospital held itself out as a provider of emergency medical services, and based its finding of the plaintiffs' implied reliance on the following facts: (1) the hospital administrator was responsible for overseeing the staffing of the emergency room with physicians; (2) the hospital had entered into a contract with independent physicians to provide physicians to staff the emergency room; (3) a person entering Brownsville's emergency room would never request a specific physician by name; and (4) testimony demonstrating that a potential or actual patient entering the emergency room would have no reason to know the physicians therein were independent contractors.¹⁶³ The plaintiffs were not required to establish their reliance on the appearance, nor were they required to produce any evidence of an actual belief that the physician who cared for their child in the emergency room was employed by Brownsville.

The Kentucky Supreme Court decision, *Paintsville Hospital Co. v. Rose*,¹⁶⁴ also misapplied Agency § 267. The *Paintsville* court relied on numerous cases which misapplied this doctrine, as well as California's post-*Stanhope* decision, *Seneris v. Haas*,¹⁶⁵ for its test for agency by estoppel.¹⁶⁶ *Seneris* applied the *Stanhope* test¹⁶⁷ to a case involving an anesthesiologist practicing in the defendant-hospital as an independent contractor.¹⁶⁸

The *Paintsville* court also relied on dicta set forth in *Bing v. Thunig*,¹⁶⁹ and based its particular application of agency by estoppel on the role that it perceived modern-day hospitals to have in today's society.¹⁷⁰ The *Paintsville*

held out a particular physician as its agent and/or employee and that a patient has accepted treatment from that physician in the reasonable belief that it is being rendered in behalf of the hospital, then the hospital will be liable for the physician's negligence.

Id. at 59.

¹⁶²704 S.W.2d 68 (Tex. Ct. App. 1985).

¹⁶³*Id.* at 75.

¹⁶⁴683 S.W.2d 255 (Ky. 1985).

¹⁶⁵291 P.2d 915 (Cal. 1955).

¹⁶⁶683 S.W.2d at 257.

¹⁶⁷See *supra* note 131 and accompanying text.

¹⁶⁸291 P.2d at 927.

¹⁶⁹143 N.E.2d 3, 8 (N.Y. Ct. App. 1957). See *supra* note 139 and accompanying text.

¹⁷⁰The *Paintsville* court stated:

The circumstances under which the hospital is liable are not unlimited. But the operation of a hospital emergency room open to the public, where the public comes expecting medical care to be provided through normal operating procedures within the hospital, falls within the limits for application of the principles of ostensible agency and apparent authority.

683 S.W.2d at 258.

court pronounced that it would be "astonishing" for a court to require a patient to inquire about the employment status of physicians who treat them in an emergency room.¹⁷¹

The dissenting opinion to the *Paintsville* majority recognized the majority's misconstruction of Agency § 267 and, like Justice Moyer in the *Clark* opinion,¹⁷² vehemently disagreed with the majority's interpretation of that section, finding they wholly disregarded Agency § 267's requisite element of reliance.¹⁷³

Wisconsin looked to the *Paintsville* decision for its application of agency by estoppel in *Pamperin v. Trinity Memorial Hospital*.¹⁷⁴ The *Pamperin* court unequivocally held that a plaintiff need only demonstrate she entered the hospital of her own volition and relied on the hospital to provide "complete emergency room care" in order to meet the burden of establishing reliance under agency by estoppel.¹⁷⁵

In reply to the defendant-hospital's contention that the court's standard for agency by estoppel would result in liability for the hospital in nearly every case where it was asserted by a plaintiff, the Wisconsin Supreme Court reasoned that a hospital would not be vicariously liable when a patient chose to have a specific physician render treatment.¹⁷⁶ This response by the *Pamperin* court evaded the issue the defendant-hospital was presenting, specifically that the test set forth by the court would, in all likelihood, result in strict liability for hospitals for any and all negligent medical treatment of physicians practicing as independent contractors. The instances where a patient actually chooses a particular physician are few in comparison to instances where a patient makes no such choice.

Like *Paintsville* and *Clark*, the *Pamperin* dissent objected to the majority's construction of agency by estoppel, finding that the courts which apply this doctrine in such a manner "misplace" the focus of it by allowing a plaintiff to rely on the reputation of the defendant-hospital rather than on the apparent agency relationship between the hospital and the physician.¹⁷⁷ The *Pamperin* dissent clearly recognized the distinction between agency by estoppel and apparent agency and, presumably, advocated the adoption of the latter.

¹⁷¹*Id.*

¹⁷²See discussion, *supra* notes 109-11 and accompanying text.

¹⁷³683 S.W.2d at 260.

¹⁷⁴423 N.W.2d 848 (Wis. 1988).

¹⁷⁵*Id.* at 857.

¹⁷⁶*Id.* at 856.

¹⁷⁷*Id.* at 860. The dissent stated:

The majority improperly focuses, as did the courts in the cases cited by the majority, on whether the plaintiff relied on the reputation of the hospital. . . . This focus is misplaced; under the doctrine of apparent authority, which is basically a theory of agency by estoppel, the question is whether a patient reasonably relied on the apparent agency relationship, not whether reliance was placed on the reputation of the hospital.

Oregon's adoption of Agency § 267 as a basis for imposing agency by estoppel is notable. In *Themins v. Emanuel Lutheran Charity Board*,¹⁷⁸ the court followed *Adamski* and reversed and remanded the lower court's finding of non-liability on the grounds they found it was reasonable for the plaintiff to rely on the holding out of the hospital. The notable aspect of the *Themins* decision concerns the court's dissemination of this Restatement section. In quoting Comment *a* to Agency § 267, the court deleted the second sentence of the Comment, which refers to the requisite element of reliance.¹⁷⁹ The *Themins* court also failed to mention the necessity of a plaintiff to establish reliance, actual or implied. Evidently, the *Themins* court found this element an unnecessary consideration.

Relying primarily on the *Paintsville* decision, Georgia applied the doctrine of agency by estoppel in *Richmond County Hospital Authority v. Brown*.¹⁸⁰ The *Richmond* court erroneously commented that Agency § 267 and Torts § 429 are interchangeable doctrines, yet appeared to give a correct reading of Agency § 267.¹⁸¹ The court cited Agency § 267's example of a taxi cab company's relationship to its drivers as a means of explaining agency by estoppel.¹⁸² By citing this illustration, the *Richmond* court appeared to recognize the necessity of actual reliance under § 267, but then dispelled this illusion by discussing society's view of hospitals and how they have changed since their formation.¹⁸³

Which section the *Richmond* court relied on and/or adopted is unclear, as they discussed Agency § 267 more extensively than Torts § 429, but then cited *Capan*¹⁸⁴ for their instructions on remand: "If they can prove the hospital represented to Isiah Brown that its emergency room physicians were its employees and that he therefore justifiably relied on the skill of the doctors but

¹⁷⁸637 P.2d 155 (Or. Ct. App. 1981).

¹⁷⁹*Id.* at 159. Comment *a* reads in its entirety:

The mere fact that acts are done by one whom the injured party believes to be the defendant's servant is not sufficient to cause the apparent master to be liable. *There must be such reliance upon the manifestation as exposes the plaintiff to the negligent conduct.* The rule normally applies where the plaintiff has submitted himself to the care or protection of an apparent servant in response to an invitation from the defendant to enter into such relations with such servant. A manifestation of authority constitutes an invitation to deal with such servant and to enter into relations with him which are consistent with the apparent authority.

RESTATEMENT (SECOND) OF AGENCY § 267 cmt. *a* (emphasis added).

¹⁸⁰361 S.E.2d 164 (Ga. 1987).

¹⁸¹*Id.* at 166.

¹⁸²*Id.*

¹⁸³*Id.*

¹⁸⁴430 A.2d 647 (Pa. Super. Ct. 1980).

suffered injury due to the legal insufficiency of their medical services, the hospital may be held liable therefor."¹⁸⁵

In *White v. Methodist Hospital South*,¹⁸⁶ the Tennessee court looked to its prior decision, *Edmonds v. Chamberlain Memorial Hospital*,¹⁸⁷ for its conclusion that agency by estoppel is a viable doctrine within their state. Admittedly following the nationwide trend, the *White* court held that an inference of reliance derived from circumstantial evidence would be sufficient for a plaintiff to establish justified reliance.¹⁸⁸

Looking to Wisconsin's decision in *Pamperin*,¹⁸⁹ its neighbor state, Illinois adopted agency by estoppel in *Gilbert v. Sycamore Municipal Hospital*,¹⁹⁰ and ended the dispute among Illinois' Appellate Courts as to whether this doctrine was applicable to hospitals. The *Gilbert* court noted that the lower court refused to apply agency by estoppel on the grounds it was unreasonable to expect a hospital to have any element or amount of control over a physician in an emergency situation where "split-second decisions are required."¹⁹¹ In rejecting this reasoning, the Illinois Supreme Court relied on case law from other jurisdictions to support its finding that the question of control is irrelevant due to the status of modern hospitals as "big business."¹⁹²

Apparently, only two jurisdictions, Massachusetts and Rhode Island, have deviated from the national trend of abrogating Agency § 267 by inferring reliance from the alleged "holding out" of modern hospitals as providers of complete, competent medical care. The Massachusetts Court of Appeals refused to find an HMO (Health Maintenance Organization) vicariously liable under agency by estoppel in *Chase v. Independent Practice Ass'n*,¹⁹³ but did conclude that HMO's are subject to this doctrine. The *Chase* court denied liability on the grounds the plaintiff did not have an actual belief that the physician at issue was an employee or agent of the HMO and, thus, could not prove reliance on the apparent agency.¹⁹⁴ Even though the *Chase* court ultimately applied the correct test under Agency § 267, the Massachusetts Appellate Court failed to distinguish apparent agency (Torts § 429) from

¹⁸⁵*Richmond*, 361 S.E.2d 164, 166-67 (Ga. 1987).

¹⁸⁶844 S.W.2d 642, 647 (Tenn. Ct. App. 1992).

¹⁸⁷629 S.W.2d 28 (Tenn. Ct. App. 1981).

¹⁸⁸844 S.W.2d at 648.

¹⁸⁹423 N.W.2d 848 (Wis. 1988).

¹⁹⁰622 N.E.2d 788, 794 (Ill. 1993).

¹⁹¹*Id.* at 793 [discussing the lower court's decision at 233 Ill. App.3d 372 (1992)].

¹⁹²*Id.* [quoting *Kashishian v. Port*, 481 N.W.2d 277, 282 (Wis. 1992)].

¹⁹³583 N.E.2d 251 (Mass. Ct. App. 1991).

¹⁹⁴*Id.* at 255.

agency by estoppel (Agency § 267), as evidenced by their reference to *Hannola* and their mislabeling of the test they set forth as ostensible agency.¹⁹⁵

Rhode Island also strictly construed Agency § 267 in *Rodrigues v. Miriam Hospital*.¹⁹⁶ The *Rodrigues* court promulgated the following three-prong test for agency by estoppel pursuant to their reading of Agency § 267 and prior Rhode Island case law dealing with this doctrine in contractual settings:

The patient must establish (1) that the hospital, or its agents, acted in a manner that would lead a reasonable person to conclude that the physician was an employee or agent of the hospital, (2) that the patient actually believed the physician was an agent or a servant of the hospital, and (3) that the patient thereby relied to his detriment upon the care and skill of the allegedly negligent physician.¹⁹⁷

Applying this heightened standard to the evidence propounded by the plaintiff, the *Rodrigues* court denied her allegation of agency by estoppel and concluded there was insufficient evidence of any actual belief by the plaintiff that the allegedly negligent physician was employed by the hospital, resulting in a failure to establish justified reliance.¹⁹⁸

V. CONCLUSION

The misapplication of Agency § 267 by the numerous state courts which have adopted agency by estoppel results in defendant-hospitals located within these states to be faced with an insurmountable burden to overcome. Where a defendant-hospital is faced with an allegation of agency by estoppel, under either Torts § 429 or the misapplied Agency § 267, their only hope for a successful defense can be an admission by the plaintiff confirming she was fully aware the hospital was not responsible for doctors working therein as independent contractors, or, a settlement by the plaintiff with the allegedly negligent physician.¹⁹⁹

It is disconcerting that state courts continue to impose liability upon hospitals under the deep pocket theory when it no longer furthers public policy or the interests of the citizens of the state, as this theory ultimately places the monetary burden on the health care consumer. The soundness of this trend is further weakened by the fact that physicians generally have ample insurance coverage to ensure payment of any adverse judgment, rendering the need for

¹⁹⁵*Id.*

¹⁹⁶623 A.2d 456 (R.I. 1993).

¹⁹⁷*Id.* at 462.

¹⁹⁸*Id.*

¹⁹⁹*Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 797 (Ill. 1993) ("[W]e hold that the rule announced in *American National Bank* that 'any settlement between the agent and the plaintiff must also extinguish the principal's vicarious liability' . . . stands regardless of whether the plaintiff's covenant not to sue the agent expressly reserves the plaintiff's right to seek recovery from the principal.") (citation omitted).

an alternate payor moot. Furthermore, a majority of states actually require physicians to obtain medical malpractice liability insurance when applying for a license to practice medicine within their state.

In Ohio, it is unlikely that court decisions will further the public interest in lowering health care costs, at least not in the area of medical malpractice adjudication. This is evidenced not only by the decision to overrule *Albain*, but also by the extension of the *Clark* decision by the *Costell* court.

If Agency § 267 were applied correctly, a plaintiff would have to produce evidence of her beliefs regarding the employment status of the treating physician and that she relied on this belief to her detriment. A defendant hospital, in turn, could then attempt to rebut this evidence by means of discovery and cross-examination. Although Agency § 267's requirements are difficult for a plaintiff to meet, they are clearly preferable, so the determination of liability rests on fact rather than merely on the existence of a hospital.

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